1813/H

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-98-44-AR73.9
31 May 2007
(1813/H - 1807/H)

P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 31 May 2007

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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

ICTR Appeals Chamber
Date: 31 May 2007
Action: P.T.
Copied To: Concerned Judges, SLs, Legal Parties, Admin, LS
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Case No. ICTR-98-44-AR73.9

DECISION ON "JOSEPH NZIRORERA'S INTERLOCUTORY APPEAL OF DECISION ON OBTAINING PRIOR STATEMENTS OF PROSECUTION WITNESSES AFTER THEY HAVE TESTIFIED"

Counsel for the Defence:

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1. **THE APPEALS CHAMBER** of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses After They Have Testified" filed on 11 April 2007 ("Motion" and "Applicant", collectively).

2. On 23 April 2007, the Prosecution filed its Response, opposing the Motion,[1] and the Applicant filed his Reply on 25 April 2007.[2]

A. Background

3. This is an appeal against the "Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK and UB" of 22 March 2007 ("Impugned Decision"), which was rendered by Judges Dennis C. M. Byron and Gberdao Gustave Kam. The Impugned Decision was issued following a motion[3] by the Applicant, which was filed before a full bench of Trial Chamber III composed of Judges Dennis C. M. Byron, Emile Francis Short and Gberdao Gustave Kam.[4] On 19 January 2007, Judge Short withdrew from the bench. According to the Applicant, the Presiding Judge, Judge Byron, requested the President to authorise him and Judge Kam to "conduct routine matters" in his case, pursuant to Rule 15*bis* (F) of the Tribunal's Rules of Procedure and Evidence ("Rules").[5] On receipt of this authorisation, Judges Byron and Kam ("remaining Judges") deliberated on the Motion filed before the Trial Chamber and rendered the Impugned Decision even though, according to the Applicant, he objected to such decision being taken in the absence of a full bench.[6]

4. On 4 April 2007, the remaining Judges granted the Applicant's request for certification to appeal two issues arising from the Impugned Decision namely, whether the remaining Judges had the authority to deliberate and render the Impugned Decision pursuant to Rule 15*bis* (F) of the

[1] "Prosecution Response to 'Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses After They Have Testified'", 23 April 2007 ("Response").
[2] "Reply Brief: Joseph Nzirorera's Interlocutory Appeal of Decision Obtaining Prior Statements of Prosecution Witnesses After They Have Testified", 25 April 2007 ("Reply").
[3] "Motion for the Request for Cooperation of [the] Government of Rwanda: Statements of Witnesses ALG, GK, and UB", 2 January 2007 ("Motion filed before the Trial Chamber").
[4] Motion, para. 16.
[5] Motion, para. 19.
[6] Motion, para. 23.

Rules; and whether the remaining Judges erred in requiring a "heightened showing of relevance" to obtain undisclosed prior statements of a Prosecution witness after that witness has testified.[7]

B. Submissions

5. The Applicant contends that the remaining Judges exceeded their authority under Rule 15*bis* (F) of the Rules when they deliberated on his Motion, which had been filed before the full bench of the Trial Chamber, and rendered the Impugned Decision.[8] He argues that Rule 15*bis* (F) of the Rules allows for the conduct of routine matters by a Chamber in the absence of one or more of its members, and that his Motion filed before the Trial Chamber was not a routine matter.[9] He requests the Appeals Chamber to vacate the Impugned Decision.[10]

6. The Applicant's second contention is that the remaining Judges erred when they held that "because a greater threshold was required to recall a witness, Mr. Nzirorera was now required to show that the statements sought 'could reveal inconsistencies between the witness' testimony and his prior statements'".[11] In support of this contention, the Applicant submits first that the Prosecution has a continuing duty to disclose prior statements of its witnesses, regardless of the content of those statements;[12] second that prior statements may be relevant and material to the trial even if they are not inconsistent with witness trial testimonies, and therefore the remaining Judges erred in requiring the Applicant to demonstrate that a prior statement was inconsistent with witness trial testimony before requesting it from the Rwandan Government;[13] and finally, the remaining Judges erred in failing to apply the "Legitimate Forensic Purpose Test", which requires a requesting party to show that access to prior testimony could be of material assistance to its case,[14] and claims that the prior statements of Witnesses ALG and GK meet the requirements of this test.[15]

7. In response, the Prosecution calls for a dismissal of the present Motion. It argues that the remaining Judges acted within their jurisdiction in ruling on the Motion filed before the Trial Chamber, as this was a procedural matter which could be properly considered pursuant to Rule 15*bis* (F) of the Rules.[16] It further argues that this rule has the purpose of allowing the remaining Judges to carry out such "administrative and procedural matters as are necessary in order to

[7] Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Case No. ICTR-98-44-T, 4 April 2007 ("Decision on Certification"), para. 6 – 10.
[8] Motion, para. 38.
[9] Motion, para. 32.
[10] Motion, para. 38.
[11] Motion, paras. 39 – 43.
[12] Motion, paras. 44 – 51.
[13] Motion, paras. 52 – 59.
[14] Motion, paras. 60 – 68.
[15] Motion, paras. 69 – 76.
[16] Response, paras. 7 – 14.

continue the trial proceedings".[17] As regards the second issue raised by the Applicant, the Prosecution submits that the remaining Judges correctly exercised their discretion in partially denying the Motion filed before the Trial Chamber.[18]

C. Discussion

8. The Appeals Chamber first considers the Applicant's contention that the Motion filed before the Trial Chamber was not a routine matter within the meaning of Rule 15*bis* (F) of the Rules[19] and that, therefore, the remaining Judges exceeded the authority conferred on them by the President, pursuant to Rule 15*bis* (F) of the Rules, when they rendered the Impugned Decision.[20] In this regard, the Applicant argues that the "delivery of decisions" in the context of this rule, refers to an "act of revealing a decision which has already been made, rather than the making of a decision itself".[21] He further argues that had the remaining Judges "simply published a decision" which had already been deliberated upon and made by the Trial Chamber prior to Judge Short's resignation, they would have been in compliance with Rule 15*bis* (F) of the Rules, but by deliberating on the Motion filed before the Trial Chamber and reaching a decision solely between themselves, they exceeded "the act of delivery of a decision" and therefore the scope of their authority, under Rule 15*bis* (F) of the Rules.[22]

9. The Appeals Chamber notes that, as a general rule, a section of a Trial Chamber shall be composed of three Judges, pursuant to Article 11 of the Statute. However, there are instances provided for in the Rules where a single Judge may act in a case[23] Also, where a Judge is unable to continue sitting in a "part-heard case" for a short duration, the other two Judges of that Trial Chamber may order a continuation of the proceedings in the absence of that Judge, if they are satisfied that it is in the interests of justice to do so.[24] Where a Judge is permanently unavailable, the two remaining Judges of the Trial Chamber may decide whether to continue the proceedings with a substitute Judge[25] which is what has happened in the present case.[26] Furthermore, pursuant to Rule 15*bis* (F) of the Rules, "the President may, if satisfied that it is in the interest of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of

[17] Response, para. 4.
[18] Response, paras. 15 – 22.
[19] *Motion*, paras. 31, 32.
[20] Motion, paras. 30 – 38.
[21] Motion, para. 33.
[22] Motion, para. 33.
[23] *See* Rules 53, 54, 73, 73*bis*, 73*ter* and 75 of the Rules, which provide for orders and decisions to be issued by a single Judge, and Rule 62 of the Rules, which provides for initial appearance proceedings to be conducted by a single Judge.
[24] Rule 15*bis* (A) of the Rules.
[25] Rule 15*bis* (D) of the Rules.
[26] *See* Decision on Continuation of the Proceedings, 6 March 2007, where the remaining Judges decided to continue the trial in the Applicant's case with a substitute Judge.

one or more of its members". In the present case, the President authorised the Trial Chamber composed of Judges Byron and Kam, to conduct routine matters[27] pending the assignment of a substitute Judge to complete the composition of that Trial Chamber. On receipt of this authorization, the remaining Judges treated the Motion filed before the Trial Chamber as a routine matter and subsequently rendered the Impugned Decision.

10. It has been held at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), that an initial appearance constitutes a routine matter[28] and a hearing during which issues of sentencing were argued before that Tribunal's Appeals Chamber was also held to have been a routine matter.[29] Furthermore, the ICTY Appeals Chamber has held that "the making of a decision to proceed by way of deposition with regard to the examination of witnesses giving evidence on facts relating to the specific charges made against an accused, thereby having a direct bearing on the determination of the guilt or innocence of the accused, does not [. . .] constitute 'routine matters'".[30] The Appeals Chamber considers that routine matters, within the meaning of Rule 15*bis* (F) of the Rules, are generally matters of a regular and standardised nature, such as the convening of a status conference to organise exchanges between the parties, pursuant to Rule 65*bis* of the Rules. Other matters, both of a substantive and procedural nature, are generally non-routine, for the purposes of Rule 15*bis* (F) of the Rules.

11. In the present case, the Motion filed before the Trial Chamber pertained to a Defence request to the Trial Chamber "to issue a request for cooperation to the Government of Rwanda for it to produce copies of [...] documents" which related to Prosecution Witnesses ALG, GK and UB.[31] It is evident from the Applicant's submissions that the issue of obtaining documents from Rwanda can be traced as far back as 14 September 2005, when the Trial Chamber ordered the Prosecution to use its best efforts to obtain and disclose to the Defence statements made by Prosecution witnesses to the Rwandan Authorities,[32] following a motion by the Applicant. Additionally, on 13 February 2006, the Trial Chamber requested the cooperation of the Government of Rwanda to provide

[27] Impugned Decision, para. 5.
[28] *The Prosecutor v. Momir Talić*, Case No. IT-99-36/1, Order of the President for the Conduct of Routine Matters (Initial Appearance), 30 August 1999; *The Prosecutor* v. *Damir Došen and Dragan Kolundžija*, Order of the President for the Conduct of Routine Matters (Initial Appearance), 26 October 1999.
[29] *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Order of the President Authorising the Appeals Chamber to Conduct a Matter in the Absence of One of its Members, 30 August 1999; *See* transcript of appeals hearing of 30 August 1999 in *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, pp. 660 - 691.
[30] *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 14.
[31] Impugned Decision, para. 4.
[32] Motion, para. 3, referring to Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, p. 5.

statements in respect of thirty-seven witnesses, including Witnesses ALG and GK.[33] Witnesses ALG and GK have since testified and their statements have still not been received.[34] Furthermore, the Appeals Chamber notes the Applicant's submission that he has filed five written motions, and that there had been a number of other efforts, including letters to and from the Rwandan Authorities, which eventually culminated in the Motion filed before the Trial Chamber.[35] The Applicant also refers to five previous decisions rendered in his case on issues relating to disclosure of Prosecution witness statements that had been made to the Rwandan Authorities.[36] The Appeals Chamber is of the view that the history of this matter, including the extensive litigation related to it, is indicative of its non-routine nature.

12. In addition, the remaining Judges took into consideration Article 28 of the Tribunal's Statute, as well as the jurisprudence of both the Tribunal and the ICTY and acknowledged that Witnesses ALG, UN and GK were part of the thirty-seven Prosecution witnesses for whom the Trial Chamber, on 13 February 2006, requested the cooperation of the Rwandan Authorities in furnishing their statements.[37] They reasoned that, at that stage, the Applicant had satisfied the requirements for requesting the cooperation of the Rwandan Authorities to disclose these documents,[38] but the circumstances have since changed,[39] as the Motion filed before the Trial Chamber concerned Prosecution witnesses who have already testified in the Applicant's trial.[40] The Appeals Chamber is of the view that this judicial exercise further reflects the non-routine nature of the issues ruled upon in the Impugned Decision.

13. In sum, the Appeals Chamber considers that in the present case, the issues raised in the Motion filed before the Trial Chamber and ruled upon in the Impugned Decision cannot be considered routine matters within the meaning of Rule 15*bis* (F) of the Rules, by virtue of their complex history and legal nature.

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[33] *See* Impugned Decision para. 2 referring to Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006.
[34] *See* Impugned Decision, para. 6.
[35] Motion, paras. 3 -16.
[36] Motion, paras. 3 -14, referring to Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005; Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006; Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council, 2 October 2006; Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006; Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda, 27 November 2006.
[37] Impugned Decision, paras. 2, 9, 10, referring to Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006.
[38] Impugned Decision, para. 9.
[39] Impugned Decision, paras. 6, 10.
[40] Impugned Decision, para. 10.

D. Conclusion

14. On the basis of the foregoing, the Appeals Chamber finds that the remaining Judges exceeded the authority conferred on them by the President, pursuant to Rule 15*bis* (F) of the Rules, in rendering the Impugned Decision. In light of this determination, the Appeals Chamber will not consider the Appellant's contention that the remaining Judges erred by applying an incorrect standard in relation to his request for prior Prosecution witness statements.

E. Disposition

15. For the aforementioned reasons, the Appeals Chamber:

GRANTS the appeal filed by Joseph Nzirorera in part; and

VACATES the Impugned Decision.

Done in English and French, the English text being authoritative.

Dated this the 31 day of May 2007,
at The Hague,
The Netherlands.

[Seal of the Tribunal]

Judge Fausto Pocar,
Presiding

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✖ Concerned Associate Legal Officers
✖ Ms. Fatou Fall

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✖ Lead Counsels / *Conseil Principal*: Ms. Dior Diagne, Ms. Chantal Hounkpatin, Mr. Peter Robinson (name / nom)
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